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No. 08-622

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SUPREME COURT, U.S.

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GUSTAVO VILLANUEVA-SOTELO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether conviction under 18 U.S.C, § 1028A(a)(1), the federal aggravated identify theft statute, requires proof that a defendant who "knowingly" made use of a "means of identification of another person" knew that the means of identification in question in fact belonged to another person.

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STATEMENT

Respondent Gustavo Villanueva-Sotelo was arrested in the District of Columbia on August 5, 2006. He was in possession of a permanent resident card that had his name and photograph but bore an alien registration number that was assigned to another person. Pet. App. 2a. Respondent pled guilty to charges of unlawful entry of a removed alien in violation of 8 U.S.C. § 1326(a) and (b)(1) and possession of a fraudulent permanent resident card in violation of 18 U.S.C. § 1546(a). Pet. App. 3a. He was sentenced to 18 months' imprisonment. After serving his sentence, respondent was deported to Mexico. He is not presently in this country.

In addition to these counts, the government charged respondent with aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1), which imposes a penalty of two years' imprisonment on a person who, in connection with certain enumerated offenses, "knowingly transfers, possesses or uses, without lawful authority, a means of identification of another person." When the government conceded that it could not prove that respondent knew the alien registration number in his possession was assigned to someone else and therefore was "a means of identification of another person," the district court dismissed that count. Pet. App. 58a-80a.

A divided panel of the District of Columbia Circuit affirmed the district court's interpretation of the statute. Pet. App. 1a-55a. The majority found the statute's language ambiguous, but upon examining the purpose and history of the law, as well as supporting canons of interpretation, concluded that "[S]ection 1028A(a)(1)'s mens rea requirement extends to the 'aggravated identity theft' statute's de-

fining element—that the means of identification belongs to another person." Pet. App. 23a. After reaching this conclusion, the court added that, "[e]ven if we harbored any doubt about this—that is, were we unable to find 'an unambiguous intent on the part of Congress'—we would 'turn to the rule of lenity to resolve the dispute.'" *Ibid.* (citing *United States* v. *West*, 393 F.3d 1302, 1311 (D.C. Cir. 2005)). The full court subsequently denied rehearing en banc, with three judges dissenting. *Id.* at 81a.

REASONS FOR DENYING THE PETITION

As the government correctly notes in the petition (at 4), this Court has granted review in *Flores-Figueroa* v. *United States*, No. 08-108, to address the question of statutory interpretation also decided by the court of appeals in this case: whether, in a prosecution for aggravated identity theft, the government must prove that the defendant knew that the means of identification he or she used actually belonged to another person. The Court nevertheless should deny review in this case. Respondent has completed the sentence imposed pursuant to his plea agreement and has been deported. As the government acknowledged below while seeking rehearing (D.C. Cir. No. 07-3055, Pet. 3 n.3), respondent is not now in this country and the government is not in a position to try him on the Section 1028A(a)(1) charge, even should this Court reverse the court of appeals' decision in this case. It is inappropriate to consider this case further when doing so will have so little practical effect.

In nevertheless seeking rehearing despite its inability to retry respondent, the government contended below that en banc review was warranted to resolve the conflict in the circuits on the meaning of

Section 1028A(a)(1). D.C. Cir. No. 07-3055, Pet. 1. But whatever the validity of that rationale at the time, it has been overtaken by events; this Court will definitively resolve the issue in *Flores-Figueroa*, settling the law in the District of Columbia and all other courts of appeals. There accordingly is no reason to strain to keep this action alive, and the appropriate disposition is denial of the petition. If the Court disagrees, however, it should hold the petition in this case for disposition as appropriate in light of the decision in *Flores-Figueroa*.

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, it should be held pending the decision in *Flores-Figueroa* v. *United States*, No. 08-108, and disposed of accordingly.

Respectfully submitted.

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